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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

STEPHEN CHANG and HONGYAN CHEN,)	No. C 07-3562 SBA
)	
Plaintiffs,)	
)	
v.)	MOTION TO DISMISS THE COMPLAINT; AND [PROPOSED] ORDER
)	
MICHAEL CHERTOFF, Secretary, Department of Homeland Security;)	Date: October 16, 2007
ROBERT S. MUELLER, III, Director of the Federal Bureau of Investigation,)	Time: 1:00 p.m.
)	Courtroom: 3, 3rd Floor
Defendants.)	

I. NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on October 16, 2007, at 1:00 p.m., before the Honorable Sandra B. Armstrong, Courtroom No. 3, 1301 Clay Street, Oakland, California 94612, Defendant Robert S. Mueller, Director of the Federal Bureau of Investigation, by his attorneys, Scott N. Schools, United States Attorney for the Northern District of California, and Melanie L. Proctor, Assistant U.S. Attorney, will move this Court for an order dismissing the Complaint pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's Motion is based on this notice, the points and authorities in support of this motion, the pleadings on file in this matter, and on such oral argument as the Court may permit.

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II. INTRODUCTION

Plaintiff asks the Court to compel Defendants to adjudicate his adjustment of status application. However, the Federal Bureau of Investigation ("FBI") does not process immigration applications, and no court has found jurisdiction over the FBI in immigration cases. Accordingly, the Complaint against Robert S. Mueller should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

III. ARGUMENT

Since March 1, 2003, the Department of Homeland Security has been the agency responsible for implementing the Immigration and Nationality Act. See 6 U.S.C. §§ 271(b)(5), 557. Thus, the only relevant Defendant here is Michael Chertoff, in his capacity as Secretary of the Department of Homeland Security, and Defendant Robert S. Mueller should be dismissed. See Konchitsky v. Chertoff, No. C-07-00294 RMW, 2007 WL 2070325, at *6-7 (N.D. Cal. July 13, 2007); Dmitriev v. Chertoff, No. C 06-7677 JW, 2007 WL 1319533, at *4 (N.D. Cal. May 4, 2007).

The FBI's investigation involves a discretionary function. See Yan v. Mueller, No. H-07-0313, 2007 WL 1521732, at *6 (May 24, 2007) ("The evidence shows that the delay is due, not only to the volume of requests that the FBI receives, but also to the FBI's exercise of discretion in determining the timing for conducting the many name check requests that it receives and the manner in which to conduct those checks."); Li v. Chertoff, et al., 482 F. Supp. 2d 1172, 1179 (S.D. Cal. 2007) ("Additionally, Plaintiff has not pointed to any statute or regulation requiring the FBI to complete her name check in any period of time, reasonable or not."); Sozanski v. Chertoff, et al., No. 06-cv-0993, 2006 WL 4516968, at *1 (N.D. Tex. Dec. 11, 2006) (holding that federal district courts lack jurisdiction to compel the FBI to perform name checks in adjustment of status cases). The APA precludes review of agency actions that are committed to agency discretion by law. 5 U.S.C. § 701(a)(2).

Furthermore, mandamus is an "extraordinary remedy" available only to compel a "clear, nondiscretionary duty." Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988); Zahani v. Neufield, No. 6:05 CV 1857, 2006 WL 2246211, at *2-*3 (M.D. Fla. June 26, 2006) (holding that, because alleged delay resulted from need for FBI background checks, "even if this Court could intervene, it would not."). Plaintiff identifies no law or regulation that imposes a nondiscretionary

1 duty upon the FBI to complete Plaintiff's background check immediately or in a certain manner.
2 Accordingly, mandamus is unavailable because the FBI already is taking action, and Plaintiff
3 "simply wish[es] to force [the FBI] to [act] in a more expeditious manner." Mustafa v. Pasquerell,
4 No. SA05CA-658-XR, 2006 WL 488399, at *5 (W.D. Tex. Jan. 10, 2006).

5 **IV. CONCLUSION**

6 For the foregoing reasons, Defendant Robert S. Mueller respectfully asks the Court to
7 dismiss the Complaint.

8 Dated: September 10, 2007

Respectfully submitted,

9 SCOTT N. SCHOOLS
10 United States Attorney

11 /S/
12 MELANIE L. PROCTOR
13 Assistant U.S. Attorney
14 Attorneys for Defendants
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